Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte FLORENT PASTORE
and
ALAIN LAGRANGE

_____

Appeal No. 2003-0869
Application No. 09/692,715

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HEARD: OCTOBER 7, 2003

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Before GARRIS, TIMM, and MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1-65, which are all of the claims pending in this application.

REPRESENTATIVE CLAIM

The appellants have indicated (Brief, page 4) that, for the purposes of this appeal, the claims will stand or fall together. Consistent with this indication, we select claim 1, the broadest independent claim as representative of all of the claims on appeal. It reads as follows:

1. A composition for oxidation dyeing of keratin fibres comprising:

(a) at least one heterocyclic oxidation base chosen from

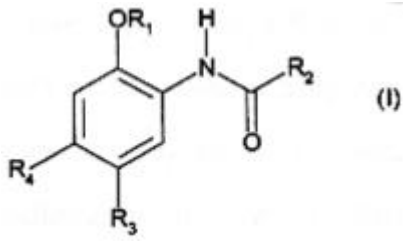
i) pyrazoles;

ii) pyrimidines chosen from diaminopyrimidines, mono- and dihydroxylated diaminopyrimidines, triaminopyrimidines and monohydroxylated triaminopyrimidines;

iii) pyrazolopyrimidines; and

iv) the acid addition salts thereof; and

(b) at least one coupler chosen from 2-substituted 5-aminoalkylphenol derivatives of formula (I) and the acid addition salts thereof:



(I)

wherein:

-R_1 is chosen from hydrogen atoms and C_2-C_5 acyl groups, optionally substituted;

-R_2 is chosen from hydrogen atoms, C_1-C_4 alkyl groups, optionally substituted, C_1-C_4 alkoxy groups, optionally substituted, and amino groups, optionally substituted;

-R_3 is chosen from hydrogen atoms, halogen atoms, C_1-C_4 alkoxy groups and C_1-C_4 monohydroxyalkoxy groups; and

-R_4 is chosen from C_1-C_4 alkyl groups, in a medium suitable for dyeing.

The References

In rejecting the claims under 35 U.S.C. § 103(a), the examiner relies upon the following references:

Ogawa et al. (Ogawa)	5,334,325	Aug. 02, 1994
Samain et al. (Samain)	5,538,517	Jul. 23, 1996
Audousset et al. (Audousset)	5,769,903	Jun. 23, 1998
Aaslyng et al. (Aasylng) (PCT Patent Application)	WO97/19998	Jun. 05, 1997

The Rejections

Claims 1-60 and 65 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ogawa in view of Audousset.

Claims 61 and 62 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ogawa in view of Audousset and further in view of Samain.

Claim 63 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ogawa in view of Audousset and further in view of Aaslyng.

The Invention

The invention relates to an oxidative dyeing composition for use on keratin fibers such as hair. The invention includes at least one heterocyclic oxidation base chosen from pyrazoles, certain pyrimidines, pyrazolopyrimidines and the acid addition salts thereof and at least one coupler chosen from 2-substituted 5-aminoalkylphenol derivatives and the acid addition salts thereof. (Appeal Brief, page 2, line 18 - page 3, line 4).

The Rejection of Claims 1-60 and 65 Under 35 U.S.C. § 103(a)

The examiner has found that Ogawa teaches a hair dyeing composition including heterocyclic oxidation bases such as 2,5-diaminopyridine and tetraaminopyridine and couplers of 2-substituted 5-aminoalkylphenol of the specified formula. (Examiner's Answer, page 3, line 16 - page 3, line 21). The examiner has additionally found that Audousset teaches a hair

dyeing composition comprising heterocyclic bases such as the claimed 4-hydroxy-2,5,6-triaminopyrimidine and 2,5-diaminopyridine as oxidation bases. The examiner has also found that this teaches the equivalence of pyridine oxidation bases to pyrazole, pyrimidine, and pyrazolopyrimidine (Examiner's Answer, page 5, lines 16-20).

The examiner thus concludes that it would have been obvious to one of ordinary skill in the art to modify the primary reference by incorporating the claimed heterocyclic bases such as pyrazoles, pyrimidines and pyrazolopyrimidines disclosed by Audousset to make such a composition. The modification is said to be obvious because they would provide for improved strong colorations and they are functional equivalents. (Examiner's Answer, page 6, lines 1-8).

The appellants, on the other hand, assert that the examiner has failed to establish a prima facie case of obviousness. (Appeal Brief, page 6, lines 6-10). More specifically, they contend that there is no motivation or suggestion to combine the references and there is no evidence showing a reasonable expectation of success in the combination (Appeal Brief, page 6, lines 3-6).

The appellants observe that the disclosure of oxidation bases in Audousset is broad. They admit that Audousset discloses pyrimidine derivatives and pyrazole derivatives are both oxidation bases, but assert that the disclosure of Audousset is to their usefulness in conjunction with a coupler of Audousset's formula I and at least one additional heterocyclic coupler to form oxidation dyes. Audousset, it is urged, never teaches or suggests the couplers of the instant claims. (Appeal Brief, page 9, lines 1-10).

We find this argument persuasive. While we agree with the examiner that Audousset discloses the functional equivalence of the oxidation bases of pyrimidine and pyrazole derivatives, we note that this disclosure is in the context of very specific coupler combinations. Audousset's couplers are indole couplers having two rings (see column 2, lines 14-30) and used in conjunction with an additional heterocyclic coupler (column 2, line 35). The instantly claimed couplers are 2-substituted 5-aminoalkylphenol derivatives, which differ substantially in structure. The oxidation coloration reaction is between the oxidation dye and a coupler (Ogawa, column 1, lines 16-21).

In order to establish a prima facie case of obviousness, there must be either some suggestion or motivation to modify the references or combine reference teachings and a reasonable expectation of success. In re Vaeck, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). In the absence of a reasonable expectation of success, one is left with only an "obvious to try" situation which is not the standard of obviousness under 35 U.S.C. § 103. See In re O'Farrell, 858 F.2d 894, 903, 7 USPQ2d 1673, 1680 (Fed. Cir. 1988).

Absent some evidence that Audousset's oxidation bases (e.g., the pyrimidine oxidation bases) would have been expected to function with a reasonable expectation of success with Ogawa's coupler system, we cannot agree that a prima facie case of obviousness has been established. Accordingly, we must reverse this rejection.

The Rejection of Claims 61 and 62 under 35 U.S.C. § 103(a)

As this rejection relies upon the combination of Ogawa and Audousset, we reverse this rejection for the reasons discussed above.

The Rejection of Claim 63 under 35 U.S.C. § 103(a)

As this rejection likewise relies upon the combination of Ogawa and Audousset, we also reverse this rejection for the reasons discussed above.

Summary of Decision

The rejection of claims 1-60 and 65 under 35 U.S.C. § 103(a) over Ogawa in view of Audousset is reversed.

The rejection of claims 61 and 62 under 35 U.S.C. § 103(a) as being unpatentable over Ogawa in view of Audousset and further in view of Samain is reversed.

The rejection of claim 63 under 35 U.S.C. § 103(a) as being unpatentable over Ogawa in view of Audousset and further in view of Aaslyng is reversed.

REVERSED

BRADLEY R. GARRIS Administrative Patent Judge	)	
CATHERINE TIMM Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JAMES T. MOORE Administrative Patent Judge	)	

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